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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,

Petitioners,

vs.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; LEGAL AID SOCIETY OF SAN FRANCISCO, EMPLOYMENT LAW CENTER; ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

KAREN K. NARASAKI
RICHARD ALBORES
NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 296-2300

KENNETH KIMERLING
Counsel of Record
SANDRA DEL VALLE
PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street
New York, New York 10013-2815
(212) 219-3360

(Additional Amici Curiae Listed Inside Front Cover)

33 pp

ADDITIONAL AMICI CURIAE
(continued from front cover)

ASIAN PACIFIC AMERICAN LABOR ALLIANCE, AFL-CIO; ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; ASIAN LAW CAUCUS, INC.; ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA; COMMUNITY SERVICE SOCIETY OF NEW YORK; HISPANIC BAR ASSOCIATION; LANGUAGE RIGHTS COALITION; MASSACHUSETTS ASSOCIATION OF HISPANIC ATTORNEYS; MULTICULTURAL EDUCATION AND TRAINING ASSOCIATION, INC.; NATIONAL ASSOCIATION FOR BILINGUAL EDUCATION; NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION; NATIONAL ASSOCIATION OF KOREAN AMERICANS; NATIONAL KOREAN AMERICAN SERVICE AND EDUCATION CONSORTIUM, INC.; ORGANIZATION OF CHINESE AMERICANS, INC.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Since its inception in 1972, the *Puerto Rican Legal Defense and Education Fund, Inc.*, (PRLDEF) has worked to protect the civil and political rights of the Puerto Rican and Latino communities. PRLDEF has represented Latinos in numerous cases throughout the country seeking to protect and further their rights in the areas of voting, education and language rights. *See, eg. Hernandez v. New York,* 500 U.S. 352 (1991). The issue presented in this case, whether English may be established as an official language, is of critical importance to the Latino community and this organization because such a policy would, if upheld, deny Latinos the ability to fully and equally participate in American society.

The *National Asian Pacific American Legal Consortium* is a not-for-profit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans through a national collaborative structure that pursues litigation, advocacy, public education and public policy development. The Consortium is interested in the present case because it believes that Article 28 places linguistic barriers on the full social and political participation of Asian Pacific Americans.

The *Legal Aid Society of San Francisco, Employment Law Center* (ELC), a project of the Legal Aid Society of San Francisco, is a private, non-profit, public interest law firm that has litigated issues relating to employment discrimination and other workplace rules for over twenty years. Through its work, ELC has challenged laws that impact upon communities of color and recent immigrants to the United States, including cases in which the rights of non-English speakers have come under challenge. *See, e.g., Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2726, 129 L.Ed.2d 849 (1994). ELC has appeared as amicus in the parallel Arizona state court challenge to Article 28. *Ruiz v. Arizona*, (Arizona Court of Appeals No. 1 CA-CV 94-235).

The *Asian Pacific American Labor Alliance*, AFL-CIO (APALA), is a non-profit labor organization founded in 1992 to defend and advocate for the civil and human rights of the Asian Pacific American community and provide a vehicle within our society for the concerns of Asian Pacific American Workers. APALA's membership includes many immigrant workers for whom English is a second language. APALA is interested in the present case because Article 28 and laws like it infringe on the rights of its members.

The *Asian American Legal Defense and Education Fund* (AALDEF) is a civil rights organization that addresses critical issues facing Asian Pacific Americans through community education, advocacy and litigation. Program priorities include the elimination of anti-Asian violence, advancement of immigrant rights, employment and labor rights, and redress for Japanese American World War II internees. AALDEF has an interest in opposing Article 28 because we believe that it violates the civil and political rights of Asian Pacific Americans in contravention of the work of this organization.

The *Asian Law Caucus, Inc,*. (ALC) is a not-for-profit, public interest legal organization whose mission is to promote, advance and represent the civil rights of Asian and Pacific Islander (API) communities. Since the majority of APIs are foreign-born, ALC's first priority is working to overcome language barriers to facilitate the full political participation of all members of society. ALC believes that Article 28 punitively singles out limited English proficient Arizonans by denying them access to basic services and the opportunity to fully participate in society.

Founded in 1983, the *Asian Pacific American Legal Center of Southern California* (APALC) is a not-for-profit legal organization dedicated to serving the Asian and Pacific Islander communities through direct services, community education, leadership development, advocacy and litigation. Programs focus on immigration, language rights and civil rights amongst other issues. APALC opposes Article 28 because it unduly burdens the rights of Asians and Pacific Islanders.

The *Community Service Society of New York* (CSS) can trace its history of serving the poor back 150 years. Throughout this time CSS has provided direct services to the poor and immigrant communities of New York and has been a voice in promoting policies that enable these communities to escape poverty. CSS promotes the respect and development of various languages and the simple notion that the government must be able to respond to the needs of its constituents in languages they can understand. To that end CSS has testified before legislative bodies on language policy issues and therefore, has an interest in the proceedings herein.

Founded in 1973, the *Hispanic National Bar Association* is the incorporated, non-profit, national association of Hispanic (HNBA) attorneys, judges, law professors and law students committed to promoting, the goals and objectives of the Association. The HNBA has been the principal force behind the increased representation of Hispanics in all sectors of the legal profession and has served as a legal voice for Hispanics for over twenty years. The HNBA is dedicated to serving as the national voice for the concerns and opinions of Hispanics in the legal profession. Since Article 28 of the Arizona Constitution negatively impacts Hispanics, the present case is very important to the HNBA.

The *Language Rights Coalition* is a coalition of individuals and organizations dedicated to fighting all legislation that infringes on the linguistic integrity and civil rights of language minorities in the nation. The Coalition believes that Article 28, by imposing an official language on the population of Arizona, prevents the full participation of language minorities in the State's political life in contravention of the goals of the Coalition.

The *Massachusetts Association of Hispanic Attorneys* is a ten year old bar association that provides support and opportunities for Hispanic men and women who seek to study or practice law in Massachusetts. The organization is very concerned about the effect of laws like Article 28 on the linguistic integrity of its members and Hispanics generally and is, therefore, interested in the present

case.

The *Multicultural Education and Training Association, Inc.*, (META) is not-for-profit organization dedicated to promoting the educational and civil rights of language minorities. META is interested in the present case because Article 28 and laws like it, represent infringe on the civil and political rights of language minorities.

The *National Association for Bilingual Education* (NABE) is a national organization of bilingual educators that advocates for bilingual education and bilingual services as a means of promoting the linguistic integrity of the non-English speaking members of this nation. NABE is interested in opposing any efforts to make English the official language and is, therefore, interested in the outcome of the present case.

Founded in 1988, the *National Asian Pacific American Bar Association* is a national professional organization of Asian Pacific American attorneys, law professors and law students representing over 5,000 attorneys across the nation. The organization is very concerned about the effects of laws like Article 28 on the linguistic integrity of its members and is, therefore, interested in the present case.

The *National Association of Korean Americans* is a non-profit, national membership organization of Korean Americans. Its primary mission is to safeguard the civil rights of U.S. citizens and residents of Korean descent. It believes that Article 28 is a violation of the civil rights of Korean-Americans and is therefore interested in the present case.

The *National Korean American Service and Education Consortium, Inc.* (NAKASEC) is a not-for-profit organization founded by Korean American community organizations. NAKASEC seeks to enhance the lives of Korean Americans through education, advocacy, culture and service. NAKASEC believes that language rights are civil rights and that Article 28 discriminates against non-English speaking people including Korean Americans.

The *Organizations of Chinese Americans, Inc.* (OCA) is a national non-profit, non-partisan advocacy organization of concerned Chinese Americans and permanent residents. OCA's primary objectives include promoting active participation of Asian Americans in both civic and national matters; securing social justice, equal opportunity, and equal treatment of Asian Americans; eliminating prejudices, stereotypes and ignorance of Asian Americans and promoting the cultural heritage of Chinese and other Asian Americans. It believes that Article 28 is a violation of the civil rights of Chinese-Americans and is therefore interested in the present case.

STATEMENT OF CASE

Article 28 was adopted by a slim majority of Arizona's voters in a 1988 ballot initiative known as Proposition 106. Article 28 makes English the official language of the "ballot, the public schools and all government functions and actions." Art. 28 § 1.(1)(2). It applies to "the legislative, executive and judicial branches of government...all political subdivisions, departments, agencies, organizations and instrumentalities of [the] state including local governments and municipalities." Art. 28 §1.(3)(a)(ii).

The measure not only regulates the language of state government, but also forecloses the passage of ameliorative legislation by local governments: "[N]o entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of languages other than English." Art. 28 §3.(1)(b).

The scope and application of Article 28 is extraordinarily broad encompassing every local and state employee from the neighborhood school teacher and the local justice of the peace to elected leaders of small towns and large cities. If allowed to stand, Article 28 would make its weight felt in every corner of Arizona; neither the intimate conversations between nurses and their patients nor the rhetorical pronouncements of elected leaders would be spared the chilling effect of its reach.

The limits of Article 28 are neither known nor are apparent from its language. It broadly requires that every level and branch of government, including every entity and person, " *act* in English and no other language." Art. 28 §3.(1)(a) (emphasis added). As the Court below found, it would prohibit a rabbi, who received his license from the State, from saying "mazel tov" at a wedding. *Yniguez v. Arizonans for Official English*, 69 F.3d. 920, 932 (9th Cir. 1995). If it withstands constitutional scrutiny, Article 28 would prohibit a school teacher from explaining to parents who did not understand English how their children are faring in school and would prohibit a State judge from using Latin in her decisions. Ironically, it would also prohibit the State from printing the phrase

E Pluribus Unum used by the proponents of Proposition 106 in the Arizona Publicity Pamphlet, an official State document accompanying the Proposition. *J.A. 29.* Tragically, it would also prohibit locally funded adult classes to learn English where the native languages of the pupils would be used.

One of the most pernicious features of Article 28 is that it gives any "person who resides or does business in [the] State" the right to sue to enforce its provisions. Art. 28 § 4. A doctor, nurse or teacher trying, in good faith to provide comprehensible information to the public could successfully be sued for the "offense" of speaking a language other than English. This extreme scenario certainly cannot be ruled out given the strong positions taken by the proponents of Proposition 106; *U.S. English* called for the end to all multilingual services that were not "essential" and other proponents equated patriotism with speaking English. *J.A. 31-32.*

Although Article 28 purports to govern the speech and acts of state and local employees, it is clear that its true target is the racial and ethnic language minorities of Arizona. The provision was publicized as a way to encourage "non-English speakers to learn English." *J.A. 29.* The constitutional amendment was intended to send a "clear and simple message - English is the official language of Arizona. To function and participate in our society, every resident must know English." *J.A. 26.*

It is also clear *who* it is that comprises Arizona's non-English speaking population - ethnic and racial language minorities. Out of Arizona's total population of 3.67 million, over 3.37 million speak English.[1] Over 8% of this population is considered limited English proficient because they do not speak

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[1] Economics and Statistics Admin., BUREAU OF THE CENSUS, *Census of Population: Social and Economic Characteristics: 1990* (Table 45)(Ariz, Sept. 1993) (CP-2-4).

English "very well."[2] Of this 8%, 64% are Latinos[3], 6% are Asian Pacific Islanders; and 20% are Native Americans.[4]

It is no coincidence that Article 28 impacts so heavily, almost exclusively, in fact, on racial and ethnic language minorities. Article 28 was not passed in a vacuum but at a time of increased national immigration that has caused anxiety amongst older, more established communities. Immigrants today, mostly Asians and Latinos, are viewed with the same kind of distrust and subjected to the same kind of restrictive laws as were immigrants in years past.[5] In fact, there are documented connections between proponents of official English legislation and anti-immigrant groups.[6]

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[2] *Id.*

[3] The term "Latino" is used to describe ethnic groups who are descended from inhabitants of Mexico, Puerto Rico, Cuba, Central or South America regardless of race.

[4] *Economics and Statistics Admin., BUREAU OF THE CENSUS, CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS: 1990 (Table 45)(Ariz, Sept. 1993) (CP-2-4).* If the language restrictions of Article 28 were applied nationally, millions of language minority Americans would be impacted. Nationwide, 13.9 million Americans over the age of five do not speak English "very well." Economics and Statistics Admin., BUREAU OF THE CENSUS, *Census of Population: Social and Economic Characteristics: 1990* (Table 40)(United States, Nov. 1993)(CP-2-1).

[5] Asians, Pacific Islanders and Latinos comprise approximately 60% of recent immigrants - *See*, U.S. Immigration and Naturalization Service, *Statistical Yearbook of the Immigration and Naturalization Service, 1992*, (Table D) U.S. Government Printing Offices: Washington, D.C. 1993.

[6] As John Tanton, former head of U.S. English, wrote in a confidential memo:

> *Gobernar es poblar* tanslates "to govern is to populate." In this society where the majority rules, does this hold? Will the present majority peaceably hand over its political power to a group that is simply more fertile? . . . Can *homo cantraceptivus*

The crucial link between national origin and language usage is the "Achilles heel" of language minorities and was exploited by the proponents of Article 28 in order to achieve the disenfranchisement of newcomers. Like anti-immigrant advocates of the past, proponents of Article 28 specifically harkened Arizona's voters back to some utopian time when immigrants came to America and quickly learned English and contrasted that vision with their conception of the present. *J.A. 26.*[7]

Proponents of the Proposition saw speaking any language other than English as signs of "ethnic separatism" and "ethnic distrust." *J.A. 26; J.A.* 31. It was these "ethnics" that had to be

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compete with *homo progenitiva* [sic] if borders aren't controlled? Or is advice to limit one's family simply advice to move over
and let someone else with greater reproductive powers occupy the space?. . . Perhaps this is the first instance in which those with their pants up are going to get caught by those with their pants down! . . .

> How will we make the transition from a dominant non-Hispanic society with a Spanish influence to a dominant Spanish society with a non-Hispanic influence? . . . As Whites see their power and control over their lives declining, will they simply go quietly into the night? Or will there be an explosion? . . . We're building in a deadly disunity.

Crawford, James, HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF 'ENGLISH ONLY' at 151 (Addison-Wesley Publishing Co. 1992)

[7] The proponents' vision of the past was clearly distorted. Each new wave of immigration brings up rosy-eyed versions of the past. For example, the Federal Immigration Commission issued a report in 1911 contrasting the then "old" and "new" immigrants. The report argued that the "old" immigrants had quickly mingled with native-born Americans and became assimilated, while "new" immigrants from Italy, Russia, Hungary and other countries were less intelligent, less willing to learn English , were not assimilating, and were criminally inclined. Leibowicz, Joseph, *The Proposed English Language Amendment: Shield or Sword?* 3 YALE LAW & POL'Y REV. 519, 536-537 (1985).

forced into conformity in order to preserve national unity. The Article punishes these citizens for not knowing English and prohibits bilingual government employees from using their language skills to assist these same ethnics.

SUMMARY OF ARGUMENT

Amici respectfully urge this Court to review the First Amendment constitutionality of Article 28 with heightened scrutiny because its purpose and effect is to adversely impact racial and ethnic language minorities.

In reviewing the constitutionality of state regulations of speech, Courts have regularly examined the statute in a comprehensive manner that entails consideration of the context in which the law was created as well as its operation and effect. Despite the facial neutrality of laws, if the effect of a regulation falls most heavily on "disfavored" groups, then the state restriction is reviewed under heightened scrutiny.

Further, laws that create a structural barrier to the exercise of the political rights of minorities are also reviewed with greater suspicion. While governments may place restrictions on the public's access to the political process, if a state regulation uniquely burdens minorities, then Courts will look beyond the facial neutrality of the law and hold government to a high standard of justification.

In the present case, racial and ethnic language minorities, members of a disfavored group, are almost exclusively the victims of Article 28. This disparate negative impact is no coincidence. Instead, by exploiting the link between national origin and language usage, proponents of Article 28 intended to specifically burden racial and ethnic language minorities.

Indeed, Article 28 is part of an unfortunate national history of using content-neutral laws to attempt to marginalize language minorities. In reviewing these laws, this Court was cognizant of the context in which they were passed and on whom the burdens

of the laws would fall; the Court often brushed a veil of neutrality aside to expose the coercive agendas of these laws and strike them down as unconstitutional.

Article 28's disparate and purposeful impact on racial and ethnic language minorities and the traditional use of this type of law to alienate and punish minorities all coalesce to require this Court to apply a heightened scrutiny standard when it conducts its First Amendment review of this law. *Amici* believe that Article 28 will not survive such a review.

ARGUMENT

I

THIS COURT MUST REVIEW THE CONSTITUTIONALITY OF ARTICLE 28 WITH HEIGHTENED SCRUTINY BECAUSE OF ITS ALMOST EXCLUSIVE IMPACT ON RACIAL AND ETHNIC LANGUAGE MINORITIES

Introduction

Respondents and other *amici* have ably demonstrated that Article 28 should be struck down because it violates the First Amendment rights of governmental employees and others. *Amici* fully agree and support their analysis. However, we write separately to assist the Court in understanding the discriminatory purpose of Article 28 and its impact on racial and ethnic language minorities.

The proponents of Article 28 campaigned for the provision as a measure to bar governmental employees from writing or speaking in any language other than English. While the law was ostensibly aimed at state and local employees, its purpose and effect was to punish non-English speakers as a means to coerce

them to learn English. The law is not benign. Artucle 28 makes it impossible for non-English speakers making it impossible for them to communicate with their government and isolating them from the political discourse and the political process generally.

Because racial and ethnic language minorities, primarily Latinos, Asians and Native Americans, are almost the only ones impacted by the law, this Court must use heightened scrutiny in its First Amendment analysis of Article 28.

Amici submit that Article 28 cannot withstand that scrutiny.

A. This Court Must Review Article 28 Under Heightened Scrutiny

Although the First Amendment is most often used to protect the content of speech, or a viewpoint, it also protects speech from the "operation and effect" of statutes which, while facially neutral, have a disparate impact on disfavored groups. *See, Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931). Indeed, "naked restrictions on the dissemination of ideas," *Martin v. Struthers*, 319 U.S. 141, 147 (1949), can be achieved with content-neutral laws as easily as with those consciously attempting to restrict a particular viewpoint. *Id.*

> [C]ommon sense drives the point home: however neutral the government's intentions in enacting a law, the operation of that law may have a vastly uneven impact. There is no equality in a law prohibiting both rich and poor from sleeping under the bridges of Paris; there is no equality in law prohibiting anonymous pamhleteering by both popular and unpopular groups, *see, Talley v. California*, 362 U.S. 60, (1960).

NAACP, Western Region v. City of Richmond, 743 F.2d 1346, 1356 (9th Cir. 1984).

Despite the facial neutrality of a law, if its impact falls most heavily on disadvantaged or unpopular groups, courts must

view the law with greater suspicion and hold the government to a high standard of justification. *Id.* Indeed, as the lower Court in this case stated:

> The speech of unpopular groups, of course, often meets with hostility and repression, though it is more commonly the message that is targeted than the language in which it is communicated. Given the link between unpopular speech and unpopular groups, it is not surprising that even some of our most venerable First Amendment precedents have an (albeit implicit) equal protection component.

Yniguez 69 F.3d at, 948, n.33 (cites omitted).

For instance, in *City of Richmond*, the NAACP brought an action challenging the constitutionality of Richmond's parade ordinance that required 20 days advance notice before a parade or demonstration could be held. The civil rights organization wanted to hold a timely march after the City decided not to investigate the suspicious death of a black man in the custody of police. *Id.* at 1349.

The Ninth Circuit found that the effectiveness of a demonstration to a large extent depend upon the it timing and forum. *Id.* at 1356. The unreasonably long advance notice requirement, it reasoned, effectively denied organizations like the NAACP the ability to hold spontaneous demonstrations and marches in response to perceived injustices.

After concluding that the parade ordinance was facially content neutral, the Court found that the cities must "go a great distance" in order to justify its law because it fell most heavily on a "disfavored" group who was more likely to need to demonstrate on short notice. *Id.* at 1356. *See also, Asian American Business Group v. City of Pomona*, 716 F. Supp. 1328 (C.D.Cal 1989)

In the present case, it is the ability of Latinos, Asians and Native Americans, the largest language minority groups in

Arizona, to communicate with their government that is being suppressed. It is their First Amendment right to "give and receive information" that is at stake. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976). *See also, Board of Educ., Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 866-68 (1982); *Meyer v. Nebraska*, 262 U.S. 390 (1923)(where law struck down partly because it interfered with students' right to acquire knowledge); *Bartels v. Iowa*, 262 U.S. 404 (1923).

As the Court below found, by banning the use of "entire vocabularies" in governmental speech, Article 28 "bars or significantly interferes with the ability of the non-English speaking populace of Arizona to 'receive information and ideas.'" *Yniguez*, 69 F.3d at 935, 941, *citing to, Virginia Citizens, supra*. Indeed, Article 28 strikes at the heart of the "natural right of the members of an organized society, united for their common good to impart and acquire information about their common interests," which is the heart of the First Amendment. *Grosjean v. American Press Co*, 297 U.S. 233, 243 (1935).

It is the disparate impact of this denial of First Amendment rights on such distinct, relatively small and marginalized groups[8], however, that the lower Court here found so deplorable:

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[8] Those who speak a language other than English in America, primarily Latinos, Asians, and Native Americans, are members of ethnic groups that bear the insignia of being "discrete and insular" minorities; they are readily identifiable and saddled with a history of exclusion from American society which makes legislation that adversely impacts their rights particularly suspect. *See, U.S. v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 *(1938); San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 294, n.34 (1978); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). *See also, Cisnero v. Corpus Christi*, 467 F.2d 142, 149 (5th Cir. 1972); *U.S. v. Texas Education Agency*, 467 F.2d 848, 861 (5th Cir. 1972); *U.S. v. Test*, 550 F.2d 577, 585-586 (10th Cir. 1972); *U.S. v. Texas*, 342 F. Supp. 24, 26 (E.D. Texas, 1971); *Bokulich v. Jury Commission, Alabama*, 298 F. Supp. 181, 190 (N.D. Ala., 1968).

> We note that the adverse impact of Article 28's overbreadth is especially egregious because it is not uniformally spread over the population but falls almost entirely upon Hispanics and other national origin minorities.

Yniguez, 69 F.3d at 947 (cites omitted). Not only are language minorities most heavily impacted by Article 28, but the whole purpose of the law was to impact on this group.

Like the parade ordinance in *Richmond*, Article 28 is facially neutral. However, the *Richmond* Court did not end its analysis there. Instead, it examined the impact of the law, recognized its adverse effect on disfavored groups and used the knowledge of that effect to hold the city to a high standard of justification.

Similarly, this Court must cut through the veil of Article 28's neutrality, recognize that it impacts virtually *only* on language minorities and treat the law as what it really is -- a purposeful attempt to disenfranchise language minorities by eliminating their ability to communicate with their government.

B. The Purpose and Effect of Article 28 is to Punish Racial and Ethnic Language Minorities.

1. Non-English speakers are overwhelmingly of foreign national origin or are ethnic minorities.

Arizona's foreign-born population, racial and ethnic minorities, are the true target of Article 28. It is evident from the campaign literature for Proposition 106, that the link between foreign national origin and English language proficiency was used by the proponents of Article 28 in their appeal to Arizona's voters. Not only did its proponents argue for the need for new citizens to learn English but they also argued that:

> The state of Arizona is at a crossroads. It can move towards the fears and tensions of language rivalries and ethnic distrust, or it can reverse this trend and strengthen our common bond, the English language.

J.A. 26 This race-based forecast of conflict with language minority communities attributed to non-English speakers the propensity to destroy Arizona's social fabric. By linking language and ethnicity in the same breath and characterizing language minorities as a social threat, Article 28's proponents belied their own claims of benign motivation. This intentional impact on ethnic and racial minorities confirms the concern this Court expressed in *Hernandez v. New York*, 500 U.S. 352 (1991):

> It may well be, for certain ethnic groups and in some communities, that *proficiency in a particular language, like skin color, should be treated as a surrogate for race* under an equal protection analysis.

Hernandez at 412-3 (emphasis added). The *Hernandez* Court recognized the obvious -- the connection between language usage and certain racial and ethnic groups. *See Yu Cong Eng v. Trinidad*, 271 U.S. 500, 528 (1926) (equal protection denied to Chinese merchants who kept records in their native tongue); *see also*, *Hernandez v. Texas*, 347 U.S. 475, 480 n.12 (1954) (Spanish surnames "provide ready identification of the members of this [Mexican-American] class") and *Castaneda v. Partida*, 430 U.S. 482, 486 n.5 (1977) (Mexican-American ethnicity synonymous with "[p]ersons of Spanish language"); *Lau v. Nichols*, 414 U.S. 563, 568-9 (1974) (non-English speaking Chinese students subjected to national origin discrimination in violation of Title VI of the Civil Rights Act of 1964).[9]

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[9] Other courts and agencies have also recognized the close association between an individual's primary language and national origin. *See e.g., Fragante v. City and County of Honolulu*, 888 F.2d 591, 595 (9th Cir. 1989) (citing with approval to EEOC Title VII guidelines, 29 C.F.R. § 1606.1 *et seq.*, defining national origin discrimination to include discrimination "because an individual has the . . . linguistic characteristics

2. Courts have closely examined the purpose and effect of facially neutral language restrictions.

Article 28 is another chapter in our nation's sad history of using language restrictions to punish and alienate ethnic and racial language minorities.[10] All too often, whenever language minorities

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of a national origin group."); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1039 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989) ("[t]he cultural identity of certain minority groups is tied to the use of their primary tongue," and "rules which have a negative effect on bilinguals . . . or non-English speakers, may be mere pretexts for intentional national origin discrimination."); *United States v. Alcantar*, 897 F.2d 436, 440 (9th Cir. 1990) ("we have previously recognized how closely tied Spanish language is to Hispanic identity"); *Carino v. Univ. of Oklahoma*, 750 F.2d 815, 819 (10th Cir. 1984) (accent discrimination equivalent to national origin discrimination); *Olagues v. Russoniello*, 797 F.2d 1511, 1521 (9th Cir. 1986), *vacated as moot*, 484 U.S. 806 (1987) (same); *Berke v. Ohio Dept. of Pub. Welfare*, 628 F.2d 980, 981 (6th Cir. 1980) ("persons of different nationalities are often distinguished by a foreign language"); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1978) ("This circuit recognized Spanish speaking or Spanish-surnamed Americans as a minority for purposes of Sections 1981, 1983 and 1985(3)"); *Hernandez v. Erlenbusch*, 368 F. Supp. 752, 755 (D. Or. 1973) (tavern's rule against speaking foreign languages tantamount to racial discrimination against Mexican-Americans). *Cf. Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983); *Frontera v. Sindell* 533 F.2d 1215 (6th Cir. 1975); *Carmona v. Sheffield*, 475 F.2d. 738 (9 Cir . 1971) finding that language use alone does not identify members of a suspect class.

[10] Restrictive language policies were first used against Native Americans. The Federal government, in the late 1870's, attempted to "civilize" Native Americans and acclimate these nomadic people to reservation life. The government instituted policies ending bilingual education programs in reservation schools and forcibly removed Native American children from their homes. The government also established "Indian boarding schools" for these children where their mouths would be washed out with soap for speaking in the "barbarous" dialects of their native tongues. *See*, Crawford, James, BILINGUAL EDUCATION:

have become unpopular, attempts have been made to marginalize them by exploiting their need to communicate in languages other than English. These attempts usually took the form of facially neutral laws that prohibited the use of *any* language other than English, not just the language of the disfavored group. This Court, however, regularly saw through this facial neutrality and examined the laws within the context in which they were created and whom they effected. This Court should continue this tradition today.

During World War I, anti-foreigner, and especially anti-German, sentiment crested, leading to the adoption of legislation in fourteen states prohibiting the teaching of modern foreign languages by fourteen states.[11] In *Meyer v. Nebraska*, 262 U.S. 390 (1923) this Court recognized that restrictions on non-English languages most often were simply attempts to discriminate against unpopular minorities. Commenting on Nebraska's law which made it unlawful to teach in non-English languages, the Court noted that the Nebraska Supreme Court found that the "law affects few citizens except those of foreign lineage." *Id.* at 398. The Court also recognized that:

> The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war, and aversion to every characteristic of truculent adversaries, were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the

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HISTORY, THEORY, POLITICS AND PRACTICE, 3rd ed. at 25-26 (Bilingual Education Services 1995). Congress recently found that past federal policy lead to "acts of suppression and extermination of Native American languages and cultures, *Native American Languages Act*, 25 U.S.C. § 2809 (1990), that is only now being remedied.

[11] Leibowitz, Arnold H., *English Literacy: Legal Sanction For Discrimination*, 45 NOTRE DAME LAWYER 7 (Fall 1969) at 22, n.138.

> limitations upon the power of the state, and conflict with rights assured to plaintiff in error.

Id. at 402.

In 1927, this Court was again called upon to review the constitutionality of legislation, which this time brought foreign language schools in Hawaii under such strict governmental regulation that the schools would be required to close. *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927). Although the legislation did not target any particular language for special restriction, the Court noted that over two-thirds of the schools taught Japanese and that over the previous twenty years the number of Japanese pupils in the public and private schools generally had increased exponentially. *Id.* at 291. The asserted goals of the law was to "fully and effectively regulate the conducting of foreign language schools and the teaching of foreign languages, in order that the Americanism of the pupils be promoted." *Id.* at 293.

In striking down the legislation as unconstitutional, the Court emphasized that,

> The Japanese parent has the right to direct the education of his own child without unreasonable restrictions, the Constitution protects him as well as those who speak another tongue.

Id. at 298-99.

Similarly, in *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926), the Court struck down a Philippine law that required business owners to keep their financial records in English, Spanish or other local dialects, which local Chinese merchants could not read or write. Of the 85,000 merchants in the Philippines to whom the bookkeeping law applied, only the 12,000 Chinese merchants could not comply. *Id.* at 512. The Philippines justified the law based on their need to inspect the books of merchants to ensure that they were paying appropriate taxes. *Id.* at 514. The Court found that the law was "obviously intended chiefly to affect

[the Chinese] as distinguished from the rest of the community." *Id.* at 528. The Court also noted that public opinion can be easily swayed and the police power of a state or territory used to repress unpopular groups. "Happily for all", stated the Court, "the fundamental guaranties of the Constitution can not be freely submerged if and whenever some ostensible justification is advanced..." *Id.* at 527.

In all of these cases, a fear or animus toward a particular group lead governments to develop restrictive legislation that attempted to achieve unity by prescribing orthodoxy. In each case, this Court found those restrictions to be in violation of this nation's general tradition of tolerance and its Constitution. *See also, Epperson v. Arkansas*, 393 U.S. 97, 105 (1968) (where the language restriction in *Meyer* was described as designed to "promote civic cohesiveness by encouraging the learning of English".)

As Justice Jackson stated speaking for this Court:

> National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.
>
> Struggles to coerce conformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity. ...Compulsory unification of opinion achieves only the unanimity of the graveyard.

> It seems trite to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640-41 (1943).

Article 28 was promoted as enabling the State to protect "democracy by encouraging 'unity and political stability'; encouraging a common language; and protecting public confidence". Regardless of the merits of these goals, by reviewing Article 28 under the strictest First Amendment scrutiny, this Court would be following its considerable and noble precedent which in the past has prevented sporadic, nativist sentiment from turning this country toward deprivations of liberty and equality and away from its spirit of tolerance and freedom.

C. Article 28 Not Only Impacts On Racial and Ethnic Minorities but Creates a Structural Barrier to Their Exercise of Political Rights.

This Court should review Article 28 under heightened scrutiny not only because ethnic and racial minorities are being targeted but also because the nature of the harm leads to the political disempowerment of an entire group. Just as this Court has examined the operation and effect of content-neutral speech restrictions, this Court has also looked at the impact of facially neutral laws which effect access to the political process and used heightened scrutiny when the rights of minorities were disproportionately burdened.

Article 28 prohibits any public entity, including local and state legislatures from "mak[ing], or enforc[ing] law, order, decree or policy which requires the use of a language other than English." Article 28, § 3.1. Like the initiative struck down in *Romer v. Evans*, 64 U.S.L.W. 4353 (U.S. May 20, 1996), Article 28 precludes language minorities from seeking remedial or beneficial

legislation through the normal political process either at the state or local level. Unlike any other group, language minorities must attempt another constitutional amendment in order to undo the harmful effects of Article 28.

The imposition of such a disability on a discrete group, identifiable by a single trait is particularly heinous. As this Court stated in *Romer*: "[the] sheer breadth [of Amendment 2] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects," 64 U.S.L.W. at 4356.

Indeed this Court has often struck down laws where there was a particularly deleterious *effect* on the political rights of racial or ethnic minorities. For instance, in *Hunter v. Erickson*, 393 U.S. 385 (1964) this Court found that minorities' rights to equal access to the political process could not be unduly burdened. In that case, the City of Akron amended its charter to not only nullify a fair housing ordinance but to also make it more difficult to pass another ordinance like it. The Court found this simply impermissible. The Court stated:

> [T]he Akron charter obviously made it substantially more difficult to secure enactment of ordinances subject to [the amendment]....Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, *the reality is that the law's impact falls on the minority*...[the amendment] places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others.

Id. at 390-91 (emphasis added). *See also, Reitman v. Mulkey*, 387 U.S. 369 (1967) (where this Court overturned a state constitutional amendment that sought to overturn legislation barring racial discrimination in housing. In doing so it undertook an analysis of the amendment "in terms of its 'immediate objective,' its 'ultimate effect' and its historical context and the conditions existing before

its enactment.'" *Id.* at 373.)

The same reasoning was used in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) to invalidate a state initiative that overturned local school district's desegregation plans. The Court stated that the Equal Protection Clause goes beyond simply guaranteeing voting rights to reach, "'political structure[s] that treat all individuals as equals'...yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* at 467 (cite omitted). Although governments may make it difficult generally for its citizens to enact laws or "allocate governmental power on the basis of any general principle," using "the racial nature of an issue" to determine the governmental decisionmaking structure, imposes "substantial and unique burdens on racial minorities." *Id.* at 470, citing to *Hunter v. Erickson* (Harlan, J. concurring).

Of special importance to the instant case as well is the Court's acknowledgement in *Washington* that although the initiative was facially neutral, there was "little doubt that the initiative was drawn for racial purposes." *Id.* at 471. The Court relied upon the fact that the initiative would have no effect except on districts with mandatory busing plans and the statements made by the proponents of the initiative.

Similarly, Article 28 would have an effect only on language minorities. Further, the proponents of Article 28 have made it abundantly clear that that effect was deliberate. As in *Romer*, the present case is a situation where a state is making a "class of persons a stranger to its laws." *Romer* 64 U.S.L.W. at 4357. There is no alternative way for language minorities to effectuate their political goals except by initiating another constitutional battle where their minority interests have little hope of being effectuated. By imposing the English language on its residents through constitutional provision, Arizona is not only setting up a procedural burden on the passage of beneficial legislation for language minorities but also places a structural burden on "minority participation in the political process.

Washington at 913, fn. 23.

CONCLUSION

Article 28 was passed in Arizona amidst a growing national furor against immigrants from Mexico, Latin America and Asia. The proponents of the measure boldly exploited these sentiments by creating a spectre of ethnic disunity if Proposition 106 was not passed.

Although the law is ostensibly aimed at the speech of state and local employees, it is clearly the non-English speaking populace of Arizona that was its true target and who will be most harmed by the implementation of the law. By telling non-English speaking citizens that they must communicate with government only in English, Article 28 subjects these citizens to virtually complete social and political isolation. Unfortunately, these kinds of attempts to compel uniformity have been made in the past against whatever group was currently disfavored.

This Court has often intervened on behalf of the minority and saved the honor of our Constitution from the vagaries of tyrannical majorities. In the present case, this Court is called upon to do the same. Following the wisdom displayed in cases from *Meyer* to *Romer*, this Court must look beyond the apparent neutrality of Article 28 to consider its true agenda and its impact on racial and ethnic language minorities. Once it does, *amici* are confident that this Court will find that Article 28 violates the First Amendment.

For all of the foregoing reasons, *amici* respectfully request that this Court affirm the Ninth Circuit's decision.

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Respectfully submitted,

Kenneth Kimerling
Counsel of Record
Sandra Del Valle
PUERTO RICAN LEGAL
DEFENSE AND EDUCATION
FUND
99 Hudson Street
New York, NY 10013
(212) 219-3360

Karen K. Narasaki
Richard Albores
National Asian
Pacific American
Legal Consortium
1001 Connecticut Ave, N.W
Washington, DC 20036
(202)296-2300

ATTORNEYS FOR *AMICI*